UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant GLEN P. JOHNSON
United States Air Force

ACM 36631

31 August 2007

Sentence adjudged 13 December 2005 by GCM convened at Keesler Air Force Base, Mississippi. Military Judge: Jack L. Anderson (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 8 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Major Anniece Barber, and Major Imelda L. Paredes.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, Major Kimani R. Eason, and Captain Daniel J. Breen.

Before

FRANCIS, SOYBEL, and BRAND
Appellate Military Judges

PER CURIAM:

In accordance with his plea, the appellant was convicted of one specification each of conspiracy to commit larceny and larceny, in violation of Articles 81 and 121, UCMJ, 10 U.S.C. §§ 881, 921. His approved sentence consists of a bad-conduct discharge, confinement for 8 months, and reduction to the grade of E-1.[1]

In September 2003, the appellant and TSgt M conspired to and did steal two plasma TVs which were military property located at the base hospital. In July 2004, during acrimonious divorce proceedings, the appellant's wife informed the local Office of Special

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[1] The convening authority reduced the adjudged confinement by 2 months and deferred/waived $200 of mandatory forfeitures for 6 months or release from confinement.

Investigations of the theft. The appellant was questioned and confessed. He also named his co-conspirator who was then questioned and also confessed.

The appellant asserts his sentence is inappropriately severe given the nature of his offenses and the sentence received by his co-accused. We have reviewed the record of trial, the assignment of error, and the government's answer thereto, and find appellant's contention to be without merit.

TSgt M negotiated a pretrial agreement (PTA), which required TSgt M to agree to a stipulation of fact and to testify against the appellant,[2] and in exchange, his case was referred to special court-martial. TSgt M chose to present his case to members who sentenced him to a one stripe reduction, hard labor without confinement for 90 days, and forfeitures of $750.00 pay per month for 12 months. On the other hand, even after the co-accused's trial and his own Article 32 hearing, the appellant turned down a PTA offer which limited confinement to 4 months. He went to trial without the benefit of a PTA and decided to have a military judge decide his case.

We "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as [we find] correct in law and fact and determine[], on the basis of the entire record, should be approved." Article 66(c), UCMJ, 10 U.S.C. § 866(c). "The power to review a case for sentence appropriateness, including relative uniformity, is vested in the Courts of Criminal Appeals..." Article 66(c); *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999). The general rule regarding sentence comparison is that courts-martial are not permitted to consider sentences in other cases when determining an appropriate sentence for the accused before them. *United States v. Barrier*, 61 M.J. 482, 485 (C.A.A.F. 2005). The rule has been applied to appellate review, where sentence appropriateness "should be judged by 'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and the character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982) (quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)). "[T]he military system must be prepared to accept some disparity in the sentencing of codefendants, provided each military accused is sentenced as an individual." *United States v. Durant*, 55 M.J. 258, 261 (C.A.A.F. 2001).

A recognized exception to the rule against sentence comparison for determining appropriateness is a situation involving connected or closely related cases with highly disparate sentences. *United States v. Barrazamartinez*, 58 M.J. 173, 176 (C.A.A.F. 2003); *United States v. Hawkins*, 37 M.J. 718, 722 (A.F.C.M.R. 1993); *United States v. Capps*, 1 M.J. 1184, 1187 (C.M.R. 1976). The comparison of the sentences is not limited to the sentences in question but may be compared in relation to the maximum punishment.[3] *Lacy*, 50 M.J. at 289. The appellant bears the burden of demonstrating that any cited cases are "closely related" to his case and that the sentences are "highly disparate." *Id.* at 288.

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[2] Which TSgt M in fact did at the Article 32, UCMJ hearing and in motion practice.

[3] The maximum punishment in the appellant's case was a dishonorable discharge, confinement for 20 years, total forfeitures and reduction to E-1.

The first criterion is that there exists a correlation between each of the accused and their respective offenses. *Hawkins*, 37 M.J. at 722. These cases are closely related.

The next criterion is that the sentences are "highly disparate." *Lacy*, 50 M.J. at 288. The appellant has failed to meet his burden in demonstrating the sentences are "highly disparate." Assuming, arguendo, he has met that burden, there is a rational basis for the disparity. TSgt M negotiated a PTA, cooperated in providing evidence against his co-accused, and proceeded to trial far more quickly than the appellant. The appellant turned down a favorable PTA, and chose to have a military judge decide his case. Additionally, the appellant's sentence was far less than the maximum imposable sentence.

We have a great deal of discretion in determining whether a particular sentence is appropriate, but are not authorized to engage in exercises of clemency. *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988); *United States v. Dodge*, 59 M.J. 821, 829 (A.F. Ct. Crim. App. 2004). We conclude the appellant's sentence is not inappropriately severe, nor was it "highly disparate" when compared to the companion case.

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings and sentence are

AFFIRMED.

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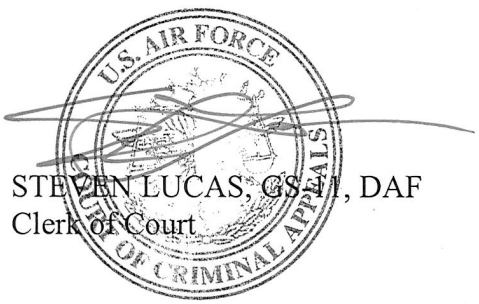

STEVEN LUCAS, GS-11, DAF
Clerk of Court